rX Atkin, W.R. Bankers' drafts and their status in law.

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BANKERS' DRAFTS AND THEIR STATUS IN LAW.

INTRODUCTION

Bankers' drafts are a means frequently employed to ensure effective settlement of payments. They are essentially instruments drawn by and drawn on a banker requesting the addressee to pay on demand to the payee on account of the drawer the sum of money specified.

The draft may be drawn by one banker upon another. This method is frequently used in overseas sales, where, as may often be the case in remoter localities, the buyer's banker is unlikely to have branches of his own. In this way, bankers can make use of a world-wide network of agents and correspondents. On the other hand, for internal payments, it is more usual for one branch of a bank to draw on itself, on another branch or on the head office of the same bank. In England both forms, i.e. those drawn on other bankers and those drawn on the same banker, are known as bankers' drafts. In Australia and New Zealand, however, instruments of the latter form are often known as bankers' cheques. Bankers' cheques differ from bankers' drafts in being less elaborately printed and less distinctive in nature, since they appear in the same form as ordinary cheques. Furthermore, they tend to be used more for purely local settlements and are thus usually drawn by one branch upon that same branch. Drafts are normally drawn on another branch, although they may sometimes be made payable

at any other branch. Both bankers' drafts and bankers' cheques may be used for internal purposes by the banks, but they are also issued to customers in exchange for the customer's personal cheque, drawn in favour of the bank (1).

The similarity of banders' cheques to ordinary cheques is obvious, and on the face of it, it would seem as though the branch bank is merely making use of the service which the banking group to which the branch belongs offers to customers at large. However, as appears below, the exact legal relationship of "bankers' cheques" and ordinary cheques is shrouded with a certain amount of doubt, which certainly means that the use of the expression "bankers' cheque" begs the basic question at issue. It is intended, therefore, to use the more neutral phrase "bankers' draft" to cover both types of instrument, except where to do so would give rise to ambiguities.

Bankers' drafts are commonly used by solicitors in the settlement of conveyancing transactions and also by other persons in settling payment of commercial transactions (2). As such they act as a half-way house between payment by cashaand payment by personal cheque. For obvious reasons it is clear that cash will not always be convenient; as far as payment by personal cheque is concerned, the creditor may be wary of the solvency of the debtor's credit. The bankers' draft will provide the creditor with as a good security as he can expect apart from cash, since the payment of the draft

will be in no way dependent upon the solvency of the debtor, but only upon that of the drawee banker (3). As bankers can be expected not to dishonour their own drafts or to fall into receivership, the creditor's security is very sound. As the banker's promise stands as good as cash, it is quite safe, therefore to hand over title deeds, bills of lading, scrip, bond warrants and the like, on presentation of a banker's draft. Drafts will also be expedient in paying taxes and customs duties, making cash deposits to government departments, and in settlements with brokers.

With this brief introduction in mind, it is now proposed to look more closely at the legal nature of bankers' drafts, and in particular those drawn by bankers upon themselves. This in turn will necessitate an examination of the nature of bills of exchange, cheques and promissory notes, and of the relationship between the head office and the branches of the same bank. It will then be necessary to discuss various statutory modifications to the conclusions drawn earlier regarding the nature of bankers' drafts, with special reference to the collecting and paying banker.

The Definition of Cheques and Bills of Exchange

A cheque is defined in section 73 of the Bills of Exchange Act 1908 as "a bill of exchange drawn on a banker payable on demand" (4). A "banker" is further defined in section 2 as including "a body of persons, whether incorporated or not, who carry on the business of banking" (5). By definition, a bankers' draft will be drawn on a banker, and as they are also payable an demand, it follows that a

banker's draft will be a cheque if it satisfies the definition of a bill of exchange. Such a definition is to be found in section 3 of the Act and reads as follows:

> "A bill of exchange is an unconditinal order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or bearer."

There has never been any doubt that a draft of the type whereby one banker draws on another banker falls within the above definition. (6). Such a draft is an unconditional order by one banker directed to another banker requiring the latter to pay to the payee or subsequent parties. With rewpect to bank drafts drawn on the same bank, difficulties have however arisen in connection with the interpretation of the phrase "addressed by one person to another". It is thus necessary to look at the judicial decisions on this question.

The Decision in Gordon's Case

The leading case in point is London City and Midland Bank Ltd v Gordon (7). The plaintiff to the action employed one Jones as his ledger clerk. The latter was authorised to open letters which arrived in the office, but had no power to endorse or deal in any way with cheques which came with the letters. In the event of the plaintiff's being absent, any such cheques or remittances were to be put to one side to await the plaintiff's return. Jones also ran a business on his own account, for which purpose he had an account at the Sparkbrook branch of the defendant's bank. Between

August 1895 and February 1899, he stole a large number of instruments which came through the plaintiff's mail, and, having endorsed those which were payable to order and therefore requiring such an endorsement, he paid them into his own account. Jones' frauds were eventually discovered, and as a consequence he was prosecuted and convicted.

The plaintiff brought two actions in connection with the several classes of instrument which Jones had misappropriated, the cause of action being conversion, or in the alternative an action for money received by the defendants for the plaintiff's use. The first action against the Capital and Counties Bank (8) only concerned cheques and thus need not detain us here. The second action against the London City and Midland Bank, although the bulk of the instruments in respect of which the action was brought were crossed cheques drawn on other bankers which the defendants had collected, did nevertheless include four small drafts addressed to the defendant's head office in London, signed by Henn, the manager of the Leamington branch of the bank. These drafts were not crossed when the defendants received them.

At first instance, the case was heard by Bucknill, J before a jury. As a matter of fact the jury found that the defendants had not acted negligently and further that they had acted in good faith, in collecting and paying the instruments. His Honour thus went on to hold that the banks were protected by section 60 of the Bills of Exchange Act, 1882. That section reads as follows:

> "Where a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement had been forged or made without authority" (9).

The plaintiff appealed against the decision of Bucknill, J on the grounds that section 60 only applied to bills of exchange and as the drawer and drawee of the draft were the same person, they did not satisfy the definition of a bill of exchange so as to fall within the protection of section 60. Counsel for the respondent banker relied initially on Charles v Blackwell (10) in order to claim that section 60 came into operation. The facts of that case were not dissimilar to Gordon's Case, although it did not concern bankers' drafts. It should also be noted that the decision was given before the passing of the 1882 codifying Act, and was in fact decided on section 19 of the Sta p Act 1853, which was a predecessor of section 60 and which will require more lengthy discussion later. In Charles v Blackwell, one Kingsford acted as the plaintiff's agent, having authority to sell and receive money but not to endorse cheques. Needless to say, he did so endorse a cheque in his capacity as agent, obtained the money from the bankers and then misappropriated it. The bank was held to be protected by the relevant legislation against an action in conversion, the section being applicable both to genuineness and the validity of the signature contained in the endorsement.

Counsel for the respondents in Gordon's Case recognised secondly the difficulties of definition involved in arguing that the drafts

were bills of exchange, but claimed that it was for the very purpose of avoiding these difficulties that Henn, the bank manager signed the draft and thus did so in his personal capacity. Even so, thirdly, counsel argued that for the purposes in question different branches of banks and their head office were acting in different capacities and were therefore different persons as required by the definition of a bill of exchange (11). Counsel used two further arguments to support his case that section 60 applied. He referred firstly to the fact that it was a common practice among bankers to draw these drafts for the benefit of customers, the implication being that bankers would not indulge in such practices unless they were reasonably confident that they would receive the same protection as in the case of other bills of exchange. And next, he noted section 5(2) and argued by analogy that instruments in which the drawer and drawee were the same person should be treated as bills of exchange or promissory notes in the present situation. By section 5(2) it is provided that the holder of a bill in which the drawer and drawee are the same person may treat that bill either as a bill of exchange or a promissory note, at his option. The final basis of the respondents case was that should sections 60 or 82 of the Bills of Exchange Act not apply then they could rely upon section 17 of the Revenue Act, 1883, which provides that sections 76 - 82 of the Bills of Exchange Act "shall extend to any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a sheque". The respondents thus might be able to rely on section 82 of the Bills of Exchange Act which

7X Atkin, E.R. Bankers' drafts and their status

protects a collecting banker against liability to the true owner of an instrument when the banker receives payment for a customer in good faith and without negligence "of a cheque crossed generally or specially to himself".

Lord Collins, refused to accept the arguments put forward by the respondents, holding in particular that the drafts did not meet the requirements of the definition of a bill of exchange because the branch was part of the same limited company as the London head office upon which the drafts were drawn. Furthermore, he held that Henn was not acting in his personal capacity in signing the fraft but in fact was acting as the banker's agent. On section 17 of the Revenue Act, His Lordship held that the drafts did not come within the section. The basis of this conclusion was the wording in that section that the document had to be "issued by a customer of any banker". "Issue" is defined in section 2 of the Bills of Exchange Act as meaning "the first delivery of a bill or note, complete in form, to a person who takes it as a holder", and his Lordship therefore quite rightly held that the draft was issued by the banker himself and not a customer of the banker.

The Master of the Rolls' judgment was supported by that of Lord Stirling. His Lordship was unimpressed by argument that section 5(2) could be invoked as the defendants could not be said to be "holders". The reason for this is that an endorsee cannot be holder if he takes under a forged endorsement (12).

7X Atkin, E.R. Bankers' drafts and their status

A further appeal was made to the House of Lords and in this appeal counsel for the banker claimed reliance not only upon the arguments used in the Court of Appeal but also upon section 19 of the Stamp Act 1853. This section was apparently overlooked in the earlier court or else was considered to be no longer applicable in view of the fact that the remainder of the 1853 Act had been repealed. The text of the section is now set out in full:

> "Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof: and it shall not be incumbent upon such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was, or is, made payable, either by the drawer or any indorser thereof."

The principal judgment of the court on the bankers' draft point was given by Lord Lindley, with the other judges expressing agreement with him (13). His judgment may be summarised as follows. (1) Section 82 is of no help to the appellants. Even if the drafts fell within the definition of a bill of exchange, the section applies only to crossed cheques and it will be remembered that the drafts were uncrossed when they were received by the bankers.

(2) In this case the applellant bankers were not only acting as collecting agents, thus giving rise to the possible defence already rejected under section 82, but also as paying bankers, as the drafts were drawn on the London City and Midland Bank. The question thus arose as to whether the bankers could rely upon section 60, quoted above, and this in turn demanded determination of the central issue

7X Atkin, E.R. Bankers' drafts and their status

as to whether the drafts constituted bills of exchange. Lord Lindley answered the question in the negative, saying:

> "I agree with the Court of Appeal in thinking that the bank, which is both drawer and drawee of these instruments, is not entitled to treat them as bills of exchange as defined in s. 3 of the Bills of Exchange Act, 1882, although a holder may sue the bank upon them, and treat them either as bills of exchange or as promissory notes: see s. 5, sub-s. 2. An instrument on which no action can be brought by the drawer can hardly be a bill of exchange within s. 3 of the Act, whatever it may be called in ordinary talk". (14).

Three principles may be adduced from the comments of Lord Lindley. Firstly, that where the drawer and the drawee of the instrument are the same person, there is no bill of exchange. Thus the old case of Magor v Hammond, cited in Harvey v Kay (15), in which all the judges were of the opinion that an instrument might be a bill of exchange even though the drawer and the drawee were the same person, must be taken as being incorrect. His Lordship bases his decision on the definition in the Bills of Exchange Act and on this basis he seems quite correct to interpret the section as requiring separate persons as drawer and drawee. His Lordship also gives as a reason for his decision the fact that the drawer could bring no action on the instrument. This is indeed correct, but follows more from the logic of the situation, in that someone can hardly be said to sue himself, rather than from some overriding legal principle. It could well be argued that it would have been sufficient to constitute a bill if the payee can bring an action, which of course he can. The second proposition contained in Lord Lindley's statement is that branches of a bank and the head office are one and the same person with respect to the issuing of bankers' drafts. This proposition will be discussed at greater length later. Finally, section 5(2)

will be of no help to the banker in trying to rely on a draft as a bill of exchange. The section is strictly limited to the of the holder.

(3) His Lordship agreed with the Court of Appeal in rejecting the respondents' argument based on section 17 of the Revenue Act.

(4) Lord Lindley went on to discuss the effect of section 19 of the Stamp Act and it was here that he was able to find a satisfactory defence for the bankers. He emphasised however that the section only applied to those bankers upon whom the instruments were drawn, i.e. a paying banker but not a collecting banker could rely upon the section.

Prior to the passing of the Stamp Act virtually all cheques were payable to bearer, owing to the fact that order cheques were subject to a penny stamp. The 1853 Act brought both types of cheque into line. The not surprising result was that order cheques increased greatly in use, especially in view of the greater protection they gave with the requirement that they be endorsed (16). However along with the increased demand and use of order cheques went the risk to the banker of an action in conversion by the true owner, should the banker have paid out on a forged endorsement. Section 19 was thus inserted at the instance of Lord Overstone in order to overcome the new risk that the bankers faced and to meet pressure from the banking fraternity (17). It is to be noticed that the form of the section is that of a proviso to the substantial provisions of the Act, but despite this Lord Lindley could find "no reason for saying that it

does not apply.... In terms it clearly does." His Lordship went on to remark that the Bills of Exchange Act had left section 19 unrepealed "although s.60 of that Act is evidently taken from s. 19 of the Act of 1853, and made applicable to bills of exchange, and to cheques, as defined in ss. 3 and 73 in the Bills of Exchange Act, 1882".

> "The only conclusion," he continued, "which I can draw from these enactments is that s. 19 of the Act of 1853 was purposely left unrepealed in order that it might apply to drafts or orders which did not fall within the definition of bills of exchange or cheques in the codifying Act of 1882. These definitions are far more limited and scientific than the sweeping descriptions contained in the Stamp Acts; and section s. 19 appears to me to be purposely preserved in order to protect bankers cashing drafts or orders on them, and which are not bills of exchange or cheques as defined in the Act of 1882, in the same way as s. 60 of that Act protects them from cashing documents drawn on them, and which are bills of exchange and cheques as defined in it" (18).

The obvious query which comes to mind from this passage of Lord Lindley's judgment is the way in which the apparent purpose of the legislature was effected. If they were so careful to avoid prejudicing banker protection as regards instruments which did not fall within the definitions in the Act, why did they not introduce a wider definition in the first place? It would have been a simple matter to deem instruments in which the drawer and drawee were the same person to be a bill of exchange. Indeed, as has been already noted, a holder is specifically given the right to treat such an instrument as a bill of exchange or a promissory note (19). Alternatively, it seems rather strange that the legislature should deliberately leave extant a solitary section of an Act which is otherwise repealed and furthermore a section which is merely included in the original Act as a proviso. The more likely procedure would have been for the

section to have been included in a suitably modified form in the codifying Act. Nevertheless, the judgment of Lord Lindley and of subsequent authorities must be taken as representing the law on the point, although it has been held that section 19 is impliedly repealed with respect to its application to bills of exchange and cheques by the inclusion of section 60 in the 1882 Act (20). This leads to a strange result, for section 60 applies only where the bill has been paid "in good faith and in the ordinary course of business". The absence of these requirements in section 19 was noted by Denman, J in Bissell & Co v Fox Bros. & Co (21), while in Carpenters' Co v British Mutual Banking Co. Ltd. (22), Lord MacKinnon assumed that the presence of the requirements in the 1882 Act meant that they also modified pro tanto the imminity given by section 19 of the Stamp Act. Lord MacKinnon's view is questionable, in view of the fact that his statement was obiter and was not backed up by any reasons. Paget argues convincingly, however, that the payment by the bank must still be made in good faith, on the ground that the banker could never be allowed to take advantage of his own wrong (23). The conclusion would appear to be that bankers in the United Kingdom can rely on section 19 when they have paid out on a banker's draft, even though they may have acted negligently or outside the ordinary cours of their business.

Other Relevant Cases

Before discussing certain aspects of the Gordon Case at greater length, it is proposed to examine other cases which have a direct bearing on the legal status of bankers' drafts.

7X Atkin, E.R. Bankers' drafts and their status

In Brown, Brough & Co v National Bank of India (Ltd) (24) a draft was drawn for £391/2/9 by the Madras branch of the defendant bank upon its head office in London, payable on demand to the plaintiffs' order. The draft was stolen and payment was obtained from the bank on a forged endorsement. It was admitted that the payment had been made in good faith and in the ordinary course of business. In the opinion of the judge, the instrument could be treated as a bill of exchange by analogy with the holder's rights under section 5(2) and so come within the protection of section 60, or alternatively that it could be treated as a promissory note. Bigham, J also looked at section 19 and felt likewise that that section should apply:

> "In ordinary commercial language this was a draft or order to pay money; indeed, the plaintiffs in their statement of claim had so described it; and a statute ought to be construed with reference to the common understanding of those whom it protected. It would follow, if this were so, that the section would apply to protect the bank in the present case" (25).

Despite these clear views, His Honour considered that he was unable to apply any of them as all the issues were resolved against the bank on the authority of the recently decided Court of Appeal decision in Gordon's Case.

This case is however of further interest since it involved a foreign draft, i.e. a draft drawn by an overseas branch on the London head office. Lord Lindley in the Gordon Case remarked on doubts expressed in text writers as to whether the protection given to bankers in section 19 of the Stamp Act in fact extended to include foreign drafts. These doubts were based on the fact that foreign

bills were not subject to stamp duty under the Act until the following year and consequently it was considered that a proviso clause in the Act would be limited in its scope to those inland documents which were subject to duty. Gordon's Case of course involved inland drafts and so the issue did not come up for determination in that case. But the attitude of Bigham, J in Brown's Case was manifestly that the section would have applied irrespective of whether the drafts were inland or foreign, had it not been for the Court of Appeal decision in Gordon. Lord Lindley's comments on the Brown Case were designed primarily to get round the fact that the judgment in that case went contrary to the view which his Lordship was about to adopt, but the inference can also be drawn that his Lordship agreed with Bigham, J's view that section 19 would have applied even though a foreign draft was involved. Further reasons may be adduced for saying that the section extends both to inland and to foreign drafts. Firstly the section is expressed in general terms and consequently may be regarded as standing on its own. Secondly, section 60 of the 1882 Act is not limited to inland bills and as that section was based on section 19, the implication is that they are both similar in their scope. Finally, and perhaps more convincingly, is that if the purpose of the section was to protect bankers against liability for payment on forged endorsements as suggested by Lord Lindley in Gordon's Case, then it would appear anomylous for such protection to be available only to the one type of draft; certainly the banker will be no more familiar with the endorsee's correct signature in the case of foreign drafts than in the case of inland drafts (26).

The next case it is necessary to analyse is Ross v London County Westminster and Parr's Bank, Ltd (27). In that case thirty-two documents worth just under £4,000 and representing money belonging to the estates of Canadian soldiers who had died in the First World War, were misappropriated by a sergeant who worked in the estates office. The defendants collected the relevant documents, amongst which were twenty-three drafts which Russian bankers in London had made on other bankers on being unable to locate the beneficiaries in Russia, and also on draft which was drawn by the Dominion Bank of Canada upon itself. An action in conversion was brought by the Paymaster-General. The defendants claimed to be able to rely upon section 82, however it was held that as the cheques were drawn payable to a public official, viz "the Officer in Charge, Estates Office, Canadian Overseas Military Forces" the bank should have been put on enquiry. As a consequence the bank was held not to have acted without negligence. Nevertheless, Bailhache, J did go on to comment that he thought the draft of the Dominion Bank of Canada was a cheque coming within the same category as all the others (28).

The status of this part of the judgment must be open to serious doubt. In Slingsby v Westminster Bank, Ltd (29) Finlay, J stated that it was not to be relied upon. Furthermore it would appear to be in plain conflict with the Gordon Case which was not cited in the judgment of Bailhach, J and which as a decision of the House of Lords is of higher authority. Admittedly, Gordon's Case was decided principally in connection with the banker's actions as paying banker,

while in Ross the defendants were merely acting as collecting banker (30). However the judgment in Gordon was clearly wide enough to cover both situations and it must therefore be concluded that a draft drawn on the drawer himself falls outside the definition of a bill of exchange for all purposes of the Act that are not specifically provided for to the contrary (31).

In Slingsby v Westminster Bank, Ltd (32) a warrant for an interest in government stock was signed by the chief accountant of the Bank of England and directed to the cashiers of the Bank of England. The note represented part of an estate of which Mrs Slingsby, the deceased's daughter was one of the executors. The warrant was endorsed by Mrs Slingsby to a solicitor, who paid it into an overdrawn account which he was operating and then disappeared. The bank claimed to be able to rely on section 82 of the Bills of Exchange Act on two grounds; (1) the note contituted a dividend warrant within section 95, which extended the provisions of the Act relating to crossed cheques to such warrants; and (2) the note was a cheque within the Act. The case was decided in favour of the bank on the first issue and so it was strictly unnecessary to decide the second issue. However Finlay, J did discuss the point and gives an interesting example of how the result in Gordon's Case may be avoided by an analysis of the capacity in which the person signing as drawer was acting (3).

> "But in what capacity was the official acting when he drew this draft? I think the true view was that he was acting as the agent of the Government. If this is so, the transaction ceases to be merely an inter-departmental one, as where a branch of a bank draws on its head office, and the substance of it is that the Government is drawing on money in the hands of the bank" (34).

The final case which it is intended to discuss at this point is McClintock v Union Bank of Australia, Ltd (35). The facts in the case were simple. The respondents' manager, acting fraudulantly and without authority, abtained certain bankers' cheques from the respondents' banker in exchange for the respondents' own cheques. The drafts were payable to bearer and crossed not negotiable. The manager paid these drafts into his own account with the appellants. The respondents then sued for conversion of the drafts. The Supreme Court of New South Wales by a majority decision held against the bankers who had collected the drafts, mainly relying on the authority of Gordon's Case to conclude that the drafts were not cheques so as to bring into operation section 88 of the Commonwealth Bills of Exchange Act 1909, the equivalent of section 82 in the United Kingdom and New Zealand legislation (36). In his dissenting judgment Gordon, J purported to distinguish Gordon's Case. He noted carefully that the defendants were acting only as collecting agents for another bank, and he considered that in this case they were holders of the documents in question. As such they were entitled to t treat them as bills of exchange (37). The other two judges, however, were quite unwilling to go along with this line of reasoning, and in so doing they made some interesting comments on the operation of section 10(2) under the Commonwealth Act, section 5(2) under United Kingdom and New Zealand law. Pring, J stated that the section did not make the instrument a bill of exchange or a promissory note as such. And further, even if the defendants were holders of the instruments, they could not invoke the section, since the holder

was only entitled to make the election when he was in fact suing on the respective documents (38). His Honour relied on the statement of Lord Lindley in Gordon, already quoted when he said that section 5(2) allowed the holder to sue the bank on the instruments, but Lord Lindley's comments were in no way directed to the question of whether section 5(2) could be raised as a defence. The gloss put on the section by Pring, J must therefore be considered a dubious interpretation, especially in view of the fact that the section is expressed in clear and general language. Ferguson, J, on the other hand, held that if the defendants were merely collecting agents they could not be holders. If they discounted the drafts rather than simply collected, i.e. if they were holders for value, then they would all outside the protection of section 88 anyway, since such protection "is conferred only on a banker who receives payment as a mere agent for collection" (39). The second limb of his Honour's statement is now obviated by statute. As to the first limb, it is uncertain whether Ferguson, J was correct. The definition of a "holder" given in section 2 is "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof". In McClintock, the bankers' drafts were payable to bearer of the drafts and so also the holder of them (40). Ferfuson, J also has an interseting comment on the holder's right of election:

> "The Act gives him the right to 'treat' it as a cheque, but that does not prevent the next holder from exercising his equal statutory right to treat it as a promissory note. It is not very clear what is to be the effect of treating it as one or the other" (41).

McClintock went on appeal to the Privy Council (42) and here the bankers were able to avoid liability in a rather interesting way. In order to have a title to sue on the bankers' cheques which the manager

had obtained from the bankers, the plaintiff would have to have ratified the manager's action. However he could not have done this without also ratifying the manager's subsequent dealing with the drafts, that is to say, including having them collected by a bank as their crossing required. Consequently the plaintiff's action failed. Because of the decision that there was no cause of action , the Judicial Committee did not go on to discuss the banker's defences under sections 88 and 10(2).

The fact that in McClintock the drafts were payable to bearer highlights a difference between the situation in the United Kingdom and that in Australia and New Zealand. It is accepted in banking circles and by most writers that because of a technicality, drafts in the United Kingdom can only be drawn payable to order. This is because the Bank Charter Act, 1844 made it unlawful for any banker to draw, accept, make or issue in England or Wales any bill of exchange or promissory note payable to bearer on demand, as such an instrument would constitute a bank note, over which the Bank of England has exclusive rights of issue (43). There is no equivalent in the Australasian jurisdictions, and consequently bankers' drafts and bankers' cheques are almost always issued payable to bearer. A further consequence of this is that it renders discussion of the application of section 60 of the Bills of Exchange Act academic, since that section applies only to bills payable to order, and also in view of the fact that bearer bills can be negotiated without endorsement (44).

The relationship between branches and head office

With the gradual expansion of commerce, the need grew for banking to develop in a parallal way to meet the new demands of merchants. Initially, bankers adopted the practice of employing another banker in the locality in which it was necessary to complete a transaction and this latter banker acted as the agent or "correspondent" of the customer's banker (45). The next stage was the growth of big joint stock banks which tended either to set up their own local branches or else take over the already existing local private bankers. Finally, there is the present-day system of large bankers with a head office in one of the main centres and branches in most smaller districts in the country (46).

Because the basis of Lord Lindley's judgment in the Gordon Case was that the Leamington branch and the head office of the London City and Midland Bank were not distinct persons, it is necessary to analyse the relationship between branches and the head office in order to see whether his Lordship was correct in reaching the conclusion that he did.

An early authority which noted the independant nature of branches for certain purposes is Clode v Bayley (47). In that case a bill of exchange was endorsed to a branch of the National Provincial Bank of England at Portmadoc, which then sent it to the Pwllheli branch, and finally from there it was endorsed to the London head office. It was held that each branch was to be considered as an independent endorsee and thus each was entitled to notice of dishonour (48). This decision was applied in London Provincial and South-Western Bank v Buszard (49)

where a cheque drawn on the Oxford branch of the plaintiffs bank was partially cashed at another branch. In the meantime the drawer had countermanded the cheque. It was held that the plaintiffs were holders in due course, since notice of countermand at one branch did not constitute notice to another branch. The plaintiffs were therefore to recover from the drawer.

Another early case is Woodland v Fear (50). Here the Bridgwater branch of the plaintiff bank cashed a cheque which had been drawn on the Glastonbury branch. When it was discovered that there were insufficient funds in the drawer's account at Glastonbury, the plaintiffs brought an action against the payee to recover the money paid out. It was held that the Bridgwater branch could not be said to have paid the cheque, but merely to have acted as collecting agents for the other branch. The bank was under no obligation to honour the cheque wxcept at the branch at which the drawer kept his account, and they were therefore entitled to be repaid. The rationale of the decision would seem to be that a bank would have difficulty in carrying on its business on any other footing, since officials at one branch connot be expected to know the state of a customer's account at another branch. The validity of this reasoning in the future may be somewhat negated, however, with the increasing centralisation of the banking system by the use of computers.

The scope of the decision in Woodland v Fear has nevertheless been limited. In Prince v Oriental Bank Corporation (51), Sir Montague E. Smith sai of the decision:

> "The case decides no more that this, that the bank came under no engagement or promise to their customer to honour his cheques at any branch except that at which he kept his account" (52).

Earlier his Lordship had commented on the status of branches by saying that "in principle and in fact they are agencies of one principal banking corporation or firm" (53), and his Lordship followed in particular the case of Garnett v M'Kewan (54). The plaintiff there had two accounts, one at the Leighton Buzzard, which was in credit to the extent of £23, and the other at the Buckingham branch, which was overdrawn just under £23. The bank purported to transfer the debit of the overdrawn account to the other account, and thus dishonoured cheques which the plaintiff drew on the latter branch. There was no special contract to say that the accounts were to be kept sepatate. It was held that the bank was entitled to combine the accounts at any time in the way in which they did so, and furthermore they could do this without giving notice to the holder of the account. On the legal position of branch banks, Baron Martin felt that it was a question of fact rather than one of law (55), while Baron Bramwell considered that it was a mixed question of law and fact (56). To illustrate the point he noted that a bank would have no right to blend accounts which were taken out in different capacities, for instance a personal account would have to be kept quite separate from a trust account.

However in the case before him, he thought that the customer should have been aware of the state of the whole account i.e. both accounts taken together, and that there would therefore be no hardship placed upon him should the accounts be combined.

The various authorities already referred to came under review by the Judicial Committee of the Privy Council in R v Lovitt (57), and this case must now be considered the leading authority on the question. The case arose over a dispute regarding the payment of succession duty to the provincial government of New Brunswick. The deceased had depcsited over $90,000 with the New Brunswick branch of the Bank of British North America, the head office of which was in London. The defendants claimed that the money was not situate in New Brunswick as was required by the New Brunswick Succession Duty Act 1896 before the duty could be levied, but in fact had been deposited to the bank generally and was therefore payable generally both inside and outside the province. The example was used of the closure of a branch; this would not mean that customers who had had accounts at that branch would be unable to redeem those accounts. In giving judgment, Lord Hodson said that "although branch banks are agencies of one principal firm, it is well settled that

for certain purposes of banking business they may be regarded as distinct trading bodies" (58). After citing cases which had made the distinction, his Lordship concluded by saying:

> "In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to particular branch. The present case comes well within the principles thus laid down, and their Lordships are of opinion that these debts were 'property situate within the province' of New Brunswick" (59).

It will be seen from Lord Hodson's judgment that the basic principle from which he begins is that branches and head office form one legal entity. Branches perate first and foremost as agents of the principal firm, although this use of the expressions "agent" and "principal" must not be confounded with the role of the "correspondent" as an agency (60). Those occasions when branches are treated separately must be considered as exceptions to the basic rule and will arise only when the relationship between the bank and the customer has been sufficiently "localized". Such "localization" occurs mainly in connection with individual accounts and in particular, it leads to the duty of the bank to pay only at the branch at which the account is situated and the duty of the customer to draw only upon that same branch (61). It may also occur when a bill has been endorsed to a particular branch; notice of dishonour will have to be sent to that branch, or alternatively, as Chorley suggests (62),

if notice is given to the head office, a period of time sufficient to allow the head office to inform its branch should be required (63).

Obviously Lord Lindley did not have the benefit of the decision in Lovitt when he gave judgment in Gordon's Case (64). Nevertheless, the above analysis of the legal nature of branches is essentially based on the case law decided prior to Gordon. When applying it to the question of whether bankers' drafts fall within the definition of a bill of exchange, it appears clear to the writer that Lord Lindley was correct in concluding as he did. To have done otherwise, he would have to have invoked the exceptional situation mentioned above, but the difficulty in doing so is that the customer cannot be considered a party to the draft. Thus in relation to the draft itself, there is nothing which could be said to amount to a "localization" of an obligation. On the contrary, the obligation which the banker carries to pay on the draft is one which the banking group bears as a whole, either as drawee or drawer. That means finally that when a branch draws a banker's draft, it is not acting as an independent entity, but rather as an agent of the whole banking group.

Paget's Criticism of Gordon's Case (65).

The criticism which Paget makes of the result in Gordon is in

relation to the application of section 19 of the Stamp Act, 1853, which has already been quoted. His thesis is based on two canons of construction: firstly, that where reference is made to a banker, it refers to him only in relation to a customer; and secondly, that where statutory protection is granted to bankers, it is designed to counteract some risk imposed upon them and should not be interpreted more widely than is necessary for that purpose. In respect of the first of these canons of construction, Paget refers to two passages in section 19. The first passage is "shall be a sufficient authority", and Paget comments that no authority is needed to pay on a bill which is drawn on the payer as principal, while such authority is necessary when a banker is paying out of the money of a customer. Charles v Blackwell (66) however made it clear that the protection contained in section 19 extended both to liability against the customer (i.e. the drawer) and to liability against the "true owner". Paget grudginly states that "this interpretation seems somewhat forced, but justified by the necessities of the situation". (67). The other portion of section 19 which Paget takes up is the last part commencing "it shall not be incumbent on such banker to prove that such indorsement..". Paget argues that it is only in relation to the way in which he fulfilled his mandate from a customer that a banker is required to prove the

genuineness of an endorsee's signature. In an action for conversion by the true owner, the onus rests upon the true owner himself to prove that the signature was forged. As a consequence, Paget argues that section 19 ought not to have been applied in Gordon to bankers' drafts, since the customer who originally ordered the draft is not a party to the draft. The usual place of the "customer" is taken by the banker himself as drawer.

Turning to the second "canon of construction", i.e. the correlation of risk and protection, Paget notes the history of the introduction of section 19, the purpose of which, as has already been seen, was to overcome the additional risks which bankers faced by the greater use of order bills following the livying of stamp duty on bearer bills. The passing of the Stamp Act did not lead however to an increase in the number of bankers' drafts being issued and so, in relation to such drafts, bankers did not encounter further risks requiring greater statutory protection. Another reason which Paget gives in support of his argument is that following the passing of the Stamp Act, bankers became legally obliged to pay order cheques drawn by a customer and pay the penny stamp, so long as the customer's account was in credit to meet the amount of the bill. On the other

hand, the issue of bankers' drafts "remained, and remains, a matter entirely at the option of the banker..... being purely voluntary and optional on the part of the banker" (68). While Paget may will be right in his analysis of the nature of the banker's obligation to issue drafts, it is to be questioned whether he is also correct with relation to the payment of the draft. For either the banker is bound to pay the draft in his capacity as drawer or drawee, and to deny that would be to beg the very question as to the legal nature of bankers' drafts, or else bankers would in practice hesitate to dishonour a promise to pay which they themselves had made. To conclude his discussion, Paget claims that the expression "draft or order drawn upon a banker" was "synonymous and alternate with 'cheque' which gradually superseded it" (68), and should have been treated thus by the House of Lords in Gordon's Case.

It is submitted with respect that the view taken by Paget is unnecessarily restrictive and pedantic and that objection can be taken to it on several grounds. Firstly, section 19 itself makes no distinction between liability to the customer and liability to the true owner. The implication is that the protection which is granted, was designed to act generally in favour of the banker. Secondly,

taking a more realistic appraisal of the situation, it must be said that the risk which the banker runs, will relate both to actions by the customer and the true owner. Consequently applying the canon of construction which Paget refers to, protection should extend to both possible types of action. A further consequence of this, is that the risk which the banker faces will arise both in relation to cheques and in relation to bankers' drafts, since the banker may very will lay himself open to suit for conversion by the true owner, if he pays out on a forged endorsement.

The third reason which seems to the writer to militate against Paget's argument, is the fact that usually there will be a customer for whom the banker's draft is drawn, and who may have grounds to claim against the banker, should he pay to a person other than the payee or his bona fide endorsees. For the relationship between the issuing banker and the customer who orders the draft is a contractual one, although this is not based upon the draft itself, but upon the form by which the customer applied for the issue of the draft (69). The application form will contain certain instructions which the banker will be bound to follow or risk liability for failing to fulfil his mandate. There is little clear authority on the point,

although some support for the proposition can be found in Porteous v Porteous (70). In that case a beneficiary under a will was suing the executrix for his share in the estate. The defendant had sent one draft for the relevant amount by registered mail but the plaintiff refused to accept it. Three smaller drafts were then sent to the plaintiff's wife who was living separately in Colorado. The endorsement on these drafts were forged and then the drafts were cashed. The plaintiff succeeded in his action, but the defendant had joined the issuing banker as third party, claiming a return of the sums paid for the drafts. The issue was decided against the banker on the grounds that he had failed to perform his contract by paying on the forged endorsements, and as a result the defendant was entitled to be reimbursed. The decision stood even though the defendant had been negligent in affording the forger with the opportunity to misappropriate the drafts (71). It can thus be seen that section19 of the Stamp Act may in fact refer to the banker "in relation to a customer" in such cicumstances that the banker will require authority from a customer to pay on a banker's draft. It is concluded therefore that the decision of the House of Lords in Gordon to find the banker protected by section 19, is justifiable in law and in logic.

Bankers' Drafts as Promissory Notes

In several cases it is suggested that the legal nature of bankers' drafts is to be found in their character as promissory notes. The point does not appear to have been taken up in Gordon, nor is it discussed by many text writers (72). If it is correct that bankers' drafts, not being bills of exchange, are in fact promissory notes, then the consequence is that much of the Bills of Exchange Act relating to bills of exchange will also relate to bankers' drafts as a sub-species of promissory notes (73). It is proposed therefore to look at those decisions which have treated them as promissory notes. Because there has been little litigation on promissory notes in recent times most of the cases referred to were decided in the nineteenth century.

In Roach v Ostler (74), an instrument in the form of a bill of exchange was drawn in Fia de Janeiro by William Ostler, deceased, directed to William Ostler, and payable to the order of Thomas Russell at thiry days sight and in case of need, to the plaintiffs for T. Russell. It was held that the instrument could be considered a promissory note and so notice of non-acceptance was not necessary. Two years later, with respect to similar instrument, Littledale, J

remarked, "this is in form a bill of exchange drawn by the company upon themselves. It is therefore, in effect, a promissory note" (75).

The leading case which concerned directly a banker's draft is Miller v Thomson (76). Here, a draft was drawn by a branch manager upon a joint stock bank on the order of the directors and was made payable at six months after date to J.C. Francis. The latter endorsed the draft to the plaintiff who was now endeavouring to sue upon it. It was held that he could do so, as it was to be considered a promissory note. Tindal C.J. said:

> "There is an absence of the circumstance of there being two distinct parties as drawer and drawee, which is essential to the constitution of a bill of exchange. That being so, the only alternative is, that this instrument is a promissory note, and is properly declared upon as such" (77).

And the comment Maule, J was:

> "This is a bill drawn by the whole company, acting by their directors, upon the whole company. It is a promise made by one partner acting on behalf of the company, under the order of the directors, that the company shall pay. It is a promise made by the company, at Dorking, to pay London. It is therefore, in effect, a promissory note" (78).

The decision seems clear authority for the suggestion that bankers' drafts are promissory notes (79). However, it may be open to some doubt as to shether it is still applicable today, since a special definition of a "promissory note" was included in the Bills of Exchange Act, passed subsequent to Miller v Thomson (80). This differed from the existing description of a promissory note given

in the Statute of Anne of 1704. That description was as follows:

> "....notes in writing, signed by the party who makes the same, whereby such party promisses to pay unto any other person or his order, any sum of maony therein mentioned....." (81).

The definition now in the Bills of Exchange Act is:

> "A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer" (82).

The question which arises is whether a banker's draft which is drawn by the banker upon himself, amounts to a promise made to another person , to pay to another a certain amount. It appears that there is no reason why such a draft would not meet the definition. According to Halsbury, there are essentially two parties to a promissory note: firstly, "the person who gives the promise, and who is called the maker", and secondly, "the person to whom the note is given, and who is called the payee" (83). In relation to bankers' drafts, there will always be two parties, the banker as drawer and drawee, that is to say the maker, and the payee. This view finds support in a dictum of Viscount Simonds in Commercial Banking Company of Sydney v Mann (84) where he says that bankers' drafts "are in legal significance promissory notes made and issued by the bank". In the absence of authority to the contrary, therefore, it seems as though the result in Miller v Thomson remains a correct representation of the law, and that this is not affected by the fact that there is now a more comprehensive definition of a promissory note to be found in the Bills of Exchange Act (85).

The interesting question which now arises is whether section 60

of the Bills of Exchange Act is applicable to promissory notes, and if the answer is that it is, then whether the section could have been invoked in Gordon's Case on those grounds. By section 89 (U.K.) and 90 (N.Z.), those provisions of the Act which relate to bills of exchange are to apply with the necessary modifications to promissory notes. Subsection 2 explains that the maker of a note is to correspond to the acceptor of a bill of exchange, and the first endorser to the drawer of the bill. And subsection 3 specifically excludes certain of the provisions of the earlier part of the Act from applying to promissory notes, but section 60 is not listed among those. Section 60 itself contains nothing which cannot by definition apply to promissory notes, unless it is said that endorsements are unnecessary for promissory notes; but clearly if this is so then endorsements would also be unnecessary for bankers' drafts and so the banker could not be liable for paying out on a forged endorsement. The conclusion appears to be therefore that section 60 can apply to promissory notes and that it can also apply to bankers' drafts(86).

Issuing or paying banker

The issuing of a banker's draft is made on the application of a customer. As has already been noted, this forms the basis of a contract between the customer and the issuing banker, by which the banker is bound to follow the issue drafts against unauthorised instructions (87), or instructions which have only partially been complied with (88).

In the event of loss of a draft, the customer is to notify the

drawee banker in order that payment may be stopped to anyone who does not have a good title. In practice, a replacement draft will be issued subject to the customer's indemnifying the banker against liability should the missing draft be presented by someone with a good title. "The indemnity should extend to the amount of the draft, together with all costs and expenses reasonably incurred by the bank in investigating the title of the person presenting the draft. This is very important, because sometimes the missing draft is presented and the bank may have to obtain legal advice with regard to the title of the person who presents it" (89). As an alternative to obtaining a replacement draft and signing an indemnity, the customer can seek reimbursement for the amount paid for the draft, less the cost of preparation (90).

The protection afforded bankers paying bankers' drafts drawn on the banker himself is similar to that governing payment of cheques. Section 60 of the Bills of Exchange Act and section 19 of the Stamp Act have already been discussed. In New Zealand, section 60 is specifically made to apply to such drafts in sub-section 2, whereby a banker who carries on the business of banking at more than one branch is for the purposes of section 60 "deemed to be an independent banker in respect of each of such branches, and a draft issued by one of such branches and payable at another shall be deemed to be a bill". Clearly the subsection applies to drafts drawn by one branch on another; but it is uncertain whether it also applies to bankers' cheques drawn by one branch upon that same branch. As such a draft is not issued by one branch and payable at another, the correct view

would appear to be that the sub-section does not cover such bankers' cheques (91). The point is somewhat academic however, as in New Zealand, bankers' cheques and drafts are almost invariably payable to bearer and section 60 applies only to bills payable to order.

Section 60 (and section 19 of the Stamp Act) applies only to those situations in which the cheque or draft appears to be properly endorsed in the payee's name, but does not extend to those situations where the endorsement is irregular or missing. Protection in this situation is to be found in section 2(2) of the Cheques Act 1960 (92). Under this provision, where a banker in good faith and in the ordinary course of business pays a draft payable an deman drawn by him upon himself, whether payable at the head office or at some other branch, he is to incur no liability by reason only of the absence of or irregularity in endorsement, and the payment shall disharge the the draft. The section would appear to be wide enough to cover those bankers' cheques which are drawn by one branch and payable at the same branch. It should be added, however, that the phrase "in the ordinary course of business" is open to interpretation. The New Zealand Bankers' Association and the Committee of London Clearing Bankers have given instructions that, in the public interest, endorsements will still be required for all cheques payable to order and presented over the counter for cash. If these instructions are not complied with, it is generally accepted that a banker would be acting outside the ordinary course of his business and consequently would forfeit the protection of the Cheques Act. The instructions of course apply to drafts drawn by one banker upon another, and it is arguable

that they are also relevant to drafts of the type drawn by the banker upon himself.

Collecting Banker

Protection to a collecting banker who receives payment of a crossed cheque was originally contained in section 82 of the Bills of Exchange Act, provided he acted in good faith and without negligence. In New Zealand, this protection is extented by section 83 to a banker who carries on the business of banking at more branches than one, and as such each branch is deemed to be an independent banker for the purposes of the sections on crossed cheques. In the United Kingdom, a similar extension was provided for in the Bills of Exchange Act, (1882) Amendment Act 1932. This protection is now contained in section 5 and 4 of the Cheques Act 1960 (N.Z.) and 1957 (U.K.) respectively. The section refers, amongst other instruments, to "any draft payable on demand drawn by a banker upon himself, whether payable at the head office or some other office of his bank". It will be noticed that this is wider in its scope than section 83 and so it should include bankers' cheques. It should also be noted that the protection in the Cheques Act applies to instruments, whether they are crossed or not.

Conclusion

The position in law of bankers' drafts would appear to be anomylous to the extent that they are unable to meet the devinition of a bill of exchange. However as has been seen, for most purposes they can be said to have been brought into line with ordinary cheques, either by special statutory provisions in the Bills of Exchange Act,

or else as in the United Kingdom by curious survival from the 1853 Stamp Act, viz section 19. Alternatively it is arguable that bankers' drafts constitute promissory notes, which will in most cases be governed by the same provisions in the Bills of Exchange Act as ordinary bills and cheques.

The difficulties which attach to the legal status of bankers' drafts do not appear to be repeated in other jurisdictions. For instance, Under the Uniform Commercial Code of the United States, the following definition of a negotiable instrument is given (93):

> Any writing to be a negotiable instrument within this Article must:
> (a) be signed by the maker or drawer; and
> (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and
> (c) be payable on demand or at a definite time; and
> (d) be payable to order or to bearer.

The section goes on to say that a "draft" or "bill of exchange" complies with the requirements of the section if it is an order. And an "order" is (94):

> ".... a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession".

Bankers' drafts are used in the United States for similar reasons as they are used in other countries. A draft which is drawn upon a banker by one of its officers is, however, known as a cashier's cheque or a treasurer's cheque. Cashier's cheques are commonly used by banks in meeting their payrolls and other operating expenses, but may also be sold to customers for transactions in which a personal cheque would not be acceptable. With regard to the Uniform Commercial

Code, there seems no reason why both bankers' drafts and cashiers' cheques whould not be treated as negotiable instruments within the definition outlined.

The United States attitude may also be compared with that contained in the Geneva Convention of 1930 on "Uniform Law on Bills of Exchange and Promissory Notes". Article 3 specifically provides that a bill "may be drawn on the drawer himself". Similarly, in the "Uniform Law on Cheques" agreed to the following year, it is provided in Article 6 that "a cheque may not be drawn on the drawer himself unless it is drawn by one establishment on another establishment belonging to the same drawer". This would appear to cover most bankers' drafts except those drawn by one branch of a bank upon the same, branch, and probably also cashiers' cheques.

Bankers' drafts in the United Kingdom and New Zealand have by a rather circuitous route been brought into line with bills of exchange for most purposes, even though they cannot meet the requirements of the statutory definition of a bill. The process may not very neat, but in practice this does not seem to create any problems.

FOOTNOTES

(1) See generally T.N. Bright Banking Law and Practice in New Zealand 2 ed. (1969) pp. 242 - 6. Cf. Commercial Banking Co. of Sydney v Mann [1961] A,C, 1,7 per Viscount Simonds; Union Bank of Australia Ltd v McClintock [1922] 1 A.C. 240 (P.C.); and Australia Bank of Commerce Ltd v Perel [1926] A.C. 737, 740 - 1 per Viscount Cave.

(2) Commercial Banking Co. of Sydney v Mann Supra.

(3) Of course, the security which the creditor receives when payment is effected by means of documentary credits will also be as great, since the credit represents a guarantee by the banker that the amount specified in the credit will be paid.

(4) The same definition is to found in section 73, Bills of Exchange Act 1882 (U.K.).

(5) As to what it means to "carry on the business of banking" see United Dominion Trust Ltd v Kirkwood. [1966] 1 A.U. E.R. 968.

(6) C.F. Ross v London County Westminster and Parr's Bank Ltd [1919] 1 K.B. 678 with respect to the Russian drafts. See post.

(7) [1903] A.C. 240 with earlier appeal to the Court of Appeal reported in [1902] 1 K.B. 242.

(8) Capital and Counties Bank v Gordon [1903] A C 240 decided in the same judgment as London City and Midland Bank v Gordon, supra.

(9) Section 60 (1) Bills of Exchange Act 1908 (N.Z.).

(10) (1877) 2 C.P.D. 151

(11) Counsel relied upon Prince v Oriental Bank Corporation (1878) 3 App Cas 325 and Willans v Ayers (1877) 3 App Cas 133(P.C.)

(12) Section 24, Bills of Exchange Act 1908. cf Lacave & Co v Credit Lyonnais [1897] 1 Q.B. 148 and Embiricos v Anglo-Austrian Bank [1905] 1 K.B. 677.

(13) As the drafts did not constitute the bulk of the instruments upon which the appeal was taken either in quantity or in vaule, Lord MacNaghten treated the matter some what lightly

7X Atkin, W.R. Bankers' drafts and their st

saying that "it is a very small point and ought not, I think, to make any difference as regards the cost of the appeal" at p. 246.

(14) At page 250.

(15) (1824) 9.B. & C. 363, 364; 109 E.R. 132, 135.

(16) See Charles v Blackwell (1877) 2 C.P.D. 151.

(17) See Lord Lindley in Gordon's Case at page 251. Also Holden The Law and Practice of Banking Volume 1 Banker and Customer (1970) Ch. 7, paragraph 58.

(18) At pages 251 - 2.

(19) Section 5(2).

(20) Carpenters' Co. v British Mutual Banking Co. Ltd. [1938] 1 K.B. 511, 534, per Lord Slesser who relied on remarks made by Lord Lindley in Gordon's Case at page 251. Lord Greer at pages 531 - 2 considered section 60 and 19 to be incosistent, and went on to say that "the sole duty of the Court after the passing of the Bills of Exchange Act B to apply section 60 of that Act." This wide statement must be taken as being limited only to bills of exchange and cheques coming within the section. The case concerned certain mis appropriated cheques, and so cannot be held to have decided anything relating to bankers' drafts. The decision is also interesting because the banker was held to have acted negligently, and so being unable to rely on section 82, but at the same time to have paid the cheques in good faith and in the ordinary course of business, so as to be able to rely on section 60.

(21) (1885) 51 L.T. 663, 665.

(22) Supra, at page 536.

(23) Paget's Law of Banking 7 ed. (1966) at page 324.

(24) (1902) 18 T.L.R. 669.

(25) Ibid, at page 670.

(26) See further Paget, op. cit pages 253 - 4.

(27) [1919] 1 K.B. 678.

(28) Ibid., at page 687.

(29) [1931] 1 K.B. 173, 187.

(30) For this reason there was no question that section 19 of the Stamp Act, 1853 might apply.

(31) See also Paget, op cit page 252, and Chorley Law of Banking 5 ed. (1967) page 38, footnote 6 who consider the Ross decision to be incorrectly decided.

(32) Supra.

(33) It may be recalled that the bank in Gordon argued unsuccessfully that the bank manager was signing in his personal capacity.

(34) At page 187.

(35) (1920) 20 S.R. (NSW) 494, on appeal to the Privy Council [1922] 1 A.C. 240. The decision was applied in Commercial Banking Co. of Sydney v Mann. [1961] A.C. 1

(36) Ibid., at pages 502, 523.

(37) Ibid., at page 515.

(38) Ibid., at page 503 - 4.

(39) Capital and Counties Bank v Gordon [1903] A.C. 240, 245 per Lord McNaghten. The effect of this decision was changed by s. 82(2), now section 5 (1) (b) of the Cheques Act 1960 (NZ), section (1) (b) of the Cheques Act 1957 (UK).

(40) Cf Brown v Swan (1921) 37 T.L.R. 787, where the banker was held to be holder.

(41) At page 523.

(42) [1922] 1 A.C. 240.

(43) See especially Holden, op cit., at page 288.

(44) Section 31 (2).

(45) The note of correspondent bankers is of course still very improtant in international transactions where banks are less likely to have overseas branches.

(46) See Chorley, op cit., 272.

(47) (1843) 12 M& W 51; 152 E.R. 1107.

(48) Cf. Fielding & Co. v Corry [1898] Q.B. 268 and Bank of Montreal v Doninion Bank (1921) 60 D.L.R. 403 (Ont.) See sections 48 & 49 Bills of Exchange Act on the requirement to give notice of dishonour.

(49) (1918), 35 T.L.R. 142.

(50) (1857), 7 E & B 519; 119 E.R. 1339.

rx Atkin, W.R. Bankers' drafts and their status

(51) (1878) 3 App Cas 325.

(52) Ibid., at page 333.

(53) Ibid., at page 332.

(54) (1872) L.R. 8 Ex. 10.

(55) Ibid., at page 13.

(56) Ibid., at page 14.

(57) [1912] A.C. 212.

(58) Ibid., at page 219.

(59) Ibid., at pages 219 - 220.

(60) This basic proposition is seen also by the fact that employees are all within the service of the one banking company, and all contracts are the compahy's no matter where they are made.

(61) Cf Burnett v Westminster Bank Ltd. [1966] 1 Q.B. 742 where the plaintiff altered the drawee branch on his personalised cheque form and so created difficulties with the computer sorting.

(62) Op. cit. 273.

(63) See also Maude v I.R.C. [1940] 1 K.B. 548, 553.

(64) Gordon was decided in 1903, Lovitt in 1912.

(65) Op. cit. pp. 189 - 194.

(66) (1877) 2 C.P.D. 151.

(67) Op. cit. 191.
(68) Op. cit. 193.

(69) Cf documentary credits, the application form for which constitutes the basis of contractual relations between the issuing banker and the customer. Under the law relating to documentary credits, however, the banker must comply strictly with the instructions received from the customer: Equitable Trust Co. of New York v Dawson Partners, Ltd. (1927) 27 Ll L.R. 49, 52.

(70) [1932] O.R. 547; [1932] 3 D.L.R. 562.

(71) Negligence will only effect the outcome if it is related directly to the forgery.

rx Atkin, W.R. Bankers' drafts and their status

(72) The main exception is Bright, op. cit. 244.

(73) See section 90 (N.Z.), section 89 (U.K.).

(74) (1827), 6 L.J.O.S.K.B. 43.

(75) Dickinson v Valpy (1829) 10 B.C. 128, 139; 109 E.R. 399, 403.

(76) (1841) 3 Man & G 576; 133 E.R. 1271.

(77) Ibid., at page 580; 1273.

(78) Ibid., at page 580; 1273.

(79) See also Fielder v Marshall (1861) 9 C.B. N.S. 606; 142 E.R. 238, and Haseldine v Winstanly [1936] 1 All E.R. 137.

(80) See section 84 Bills of Exchange Act 1908 (N.Z.) section 83 Bills of Exchange Act 1882 (U.K.).

(81) Section 1, (1704) 384 Ann C.9.

(82) This definition may be compared with the wider one to be found in section 33 (1) of the Stamp Act 1891. See below...

(83) 3 Halsbury's Laws of England 3 ed. (1953) 148.

(84) [1961] A.C. 1, 7. The dictum specifically concerned bankers' cheques.

(85) Cf prommissory notes which are drawn to the maker's order. It was held that these were incomplete instruments within the Statute of Anne because there was no "other person" to whom the note was directed: Flight v Machean (1846) 16 M & W 51; 153 E.R. 1094. Contrast Wood v Mytton (1847) 11 Q.B. 805; 116 E.R. 306, and Absolon v Marks (1847) 11 Q.B. 19; 116 E.R. 381. They could be perfected, however, by endorsement to another person, "so that the original writing snd the indorsement taken together became a binding contract, thoughaan informal one between the maker and the indorsee": Hooper v Williams (1848) 2 Ex. 13, 20; 154 E.R. 385, 388 per Baron Parke. Cf Gay v Lander Baretto (1849) 8 C.B. 433; 137 E.R. 578.

.... (U.K.) which reads: "For the purpose of the Act the expression 'promissory note' includes any document or writing (except a bank note) containing a promise to pay any sum of money."

(86) A further consequence of the nature of bankers' drafts as promissory notes is that they will be negotiable. Alternatively they may be considered negotiable by usage: Goodwin v Robarts (1875), L.R. 10 Ex. 337; 1 App. Cas 476.

(87) Bank of Montreal v Dominion Greshaw Guarantee and Casualty

Co. Ltd. [1930] A.C. 659 (P.C.)

(88) Australian Bank of Commerce Ltd v Perel [1926] A.C. 737.

(89) Holden, op. cit, 289 - 90.

(90) Cf Porteous v Porteous, supra.

(91) Cf Bright, op. cit, 244.

(92) Section 1(2) of the Cheques Act 1957 (U.K.).

(93) Article 3 - 104 (1).

(94) Article 3 - 102 (1) (b).

7X Atkin, E.R. Bankers' drafts and their st

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